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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 59

AGNES M. BANKS, WIDOW OF JOHN J. BANKS, DECEASED, AND REPRESENTATIVE OF JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, MINOR CHILDREN OF JOHN J. BANKS, DECEASED,
Petitioners,

AND

R. C. ENOS, DEPUTY COMMISSIONER,

vs.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC. AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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Now comes Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Company and respectfully pray the Court to grant a rehearing for the reason that the Court has overlooked a basic issue and has applied a double standard to the interpretation of the two sections involved.

In classifying the second claim as a Section 22 petition for review, the Court ignored all designations or labels that the second proceeding was a new claim, but interpreted the nature of that second proceeding. However, in rejecting the applicability of the sanctions of Section 33(g), the Court accepted as sacrosanct the label "remittitur." This in spite of an uncontradicted record that this "remittitur" was not the product of a judicial determination of damages.

After the Deputy Commissioner denied the first claim for compensation in 1961 with a finding that the death of the employee from fatal injuries sustained in his home was not related to his employment, a second claim was filed. It was labeled a new claim, it was given a new case number and trial was permitted by the Deputy Commissioner only for the reason it was a new claim (A-21). This second filing was treated as a new claim before the Deputy Commissioner, the District Court on appeal and in the Court of Appeals up to the time of rehearing. This Court's opinion holds that the label on the second action is irrelevant (fn. 8, Page 6) and that upon interpretation, the second claim in reality was a petition to review because of mistake as permitted under Section 22.

If the label "new claim" is irrelevant in re Section 22, then also the label "remittitur" is irrelevant in re Section 33(g).

This Court's acceptance of the word remittitur as being synonymous with judicial determination, without regard to whether there was actually a judicial determination or evaluation, constitutes the application of a double standard in the interpretation of the provisions of the statute.

The record before this Court is uncontradicted that the motion for a new trial after the $30,000 verdict against the third party did not raise the issue of the propriety of damages. The motion specified error going to the liability issue

only (A-97, 98, 99, 100). The question of damages was not before the Court. Neither petitioners' brief nor their oral argument before this Court contained a single word of rebuttal to the proof that the issue of damages was not actually before the Court at the time the so-called "remittitur" order was entered. Petitioners have argued only there was an order labeled remittitur. They have never written or argued that there was, in fact, a judicial determination of damages. The opinion of the Court is also without reference to evidence of an actual evaluation of damages.

The opinion in this regard relies solely on the 1936 New York case of *Gallagher* v. *Carol Construction,* 5 N. E. 2d 63, 64. There the Court specifically pointed out that the request for a new trial was made *only* because of the allegation that the verdict was *excessive.* The case, therefore, is without persuasive value here as this record is uncontradicted that the propriety of damages was not a part of the new trial motion.

Subsequent to the *Gallagher* case, the New York Courts have looked at the nature of the disposition of a third party action rather than at the label placed on such disposition and have consistently refused to permit further compensation proceedings when the third party disposition was by something other than an actual judicial determination regardless of whether the disposition carried a false but judicial sounding label, such as directed verdict, remittitur or judgment. (*Bogdanoff* v. *Halper,* 52 N. Y. S. 2d 625, 626 (1944); *Commissioners of Taxation and Finance* v. *General Electric Company,* 105 N. Y. S. 2d 929 (1959); *Cristiano* v. *Ninfa's Restaurant,* 139 N. Y. S. 2d 543 (1955); *Kirby* v. *Bloomingdale Brothers,* 10 N. Y. S. 2d 443 Affirmed, 281 N. Y. 856, 24 N. E. 2d 499 (1939); *Duffy* v. *Fuller,* 250 N. Y. S. 2d 108 (1964). The Courts of Appeal

subsequent to Gallagher have also required actual proof of a judicial determination rather than a label to overcome the sanction of Section 33(g). (*Marlin* v. *Cardillo*, 95 F. 2d 112 (C. A. D. C. 1938); *Utilities Insurance Company* v. *McBride*, 315 F. 2d 553, 556 (C. A. 10, 1963).

This Court's opinion now invites litigants to participate in a subterfuge of one form or another to cover up a compromise settlement by giving it a label of judgment or remittitur. The Courts of the State of New York do not tolerate such practice. Should a lesser standard apply in the Federal System?

Because this Court's decision in *Seas Shipping Company* v. *Sierecki*, 328 U. S. 85, now grants longshoremen a right of action for unseaworthiness against a third party, the Court's opinion here invites wholesale avoidance of Section 33(g) as virtually every injury to a longshoreman gives rise to an action for damage because of unseaworthiness against a third party, someone other than the employer.

Respondents respectfully suggest that this Court has ignored or overlooked the basic argument that nowhere in all of the proceedings under this second claim has any administrative body or any court considered the contention that the "remittitur" was, in fact, by agreement, that it was a compromise, and it was not a judicial determination. Commissioner Enos said he would not consider the defense because this was a legal issue (A-4). The District Court did not even hear oral argument, but simply affirmed the findings of fact of the Deputy Commissioner. The Court of Appeals did not reach the issue. Nowhere in this Court's opinion is there any mention of what evidence establishes that a judicial determination occurred. The

opinion holds only that as the order carried the label "remittitur", there was a determination and, therefore, not a compromise. Respondents have always agreed that if there is a judicial determination of damages there is no compromise. However, to label an order "remittitur" does not make it a judicial determination.

The double standard applied grants petitioners two hearings and deprives respondents of even a single consideration of the basic contention that there was never a judicial determination of damages.

If it is not the desire or the policy of this Court to examine a record on this type of issue as has been indicated, we respectfully ask that the matter be remanded so that at least on one occasion in the Federal Administrative System or the Federal Judicial System, the respondents may have a hearing on whether there was a judicial determination of damages on the motion for a new trial.

The opinion cites with approval *Bell* v. *O'Hearne,* C. A. 4, 284 F. 2d 781 (1960). There the jury returned a verdict of $6,500. To avoid appeal costs the plaintiff accepted $5,000. That acceptance was held not a compromise only because the full verdict amount of $6,500 was credited to the employer. Application of that case requires remandment here with directions that the employer be credited with the $30,000 jury verdict.

A remandment for application of the O'Hearne rule or to examine the record for any evidence of a judicial determination of damages will not contravene the Court's expressed desire to terminate litigation in this case as this Court's decision in re Section 22 guarantees that litigation will be interminable in this case and in every case where compensation is awarded. Now, this case can be retried

just as soon as the first $54.00 weekly payment is made and it can be tried again, and again, and again within one year after any payment of compensation. All that is required is the simple allegation that the Deputy Commissioner should change his mind, that he made a mistake.

The opportunity for indefinite retrial however is a unilateral right of the employer. The employee's time to seek retrial expires in one year if he loses as there are no weekly payments to continually extend the time in which to suggest that a mistake may have been made.

This practical result of the Court's decision regarding Section 22 in and of itself demonstrates that the initial structure of the Act intended Section 21 to afford an opportunity to retry or appeal the liability issues and that the purpose of Section 22 is as it has been used to this date, to consider the disability issue only. If Section 22 is permitted to reopen liability issues because of alleged mistake, the basic structure of the Act is denied and the fundamental purpose of the statute to achieve a prompt and final determination is destroyed.

Respondents, therefore, respectfully suggest that as equal justice requires a look behind the label "remittitur" as the Court looked behind the label "claim for compensation" that the Court also re-examine its decision regarding Section 22 and consider that as the amendment placing the word mistake in that section is not explained by the Congress or the Commission, it must be held that Congress did not intend to have injured employees or widows of deceased employees relitigate their cases interminably. Such right to engage in interminable litigation by one party only would be a harsh and incongruous result not to

be permitted in the interpretation of this statute. (*Voris* v. *Eikel*, 346 U. S. 328 (1953).)

Respectfully submitted,

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CERTIFICATE.

I certify that this Petition is presented in good faith and not for delay.

MARK A. BRAUN.